

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

AHO CONSTRUCTION I, INC.,

Petitioner,

v.

CITY OF MOXEE,

Respondent.

CASE No. 17-1-0002

**ORDER GRANTING
MOTION TO DISMISS**

I. INTRODUCTION

This matter comes before the Board pursuant to two motions and other pleadings filed by the parties. The Board had before it the following submittals from the parties:

- Respondent City of Moxee's Dispositive Motion to Dismiss Petition for Review, May 8, 2017;
- Petitioner's Dispositive Motion Granting Petitioner's Challenge to Compliance With Notice Public Participation Requirements, May 11, 2017;
- Petitioner's Response to City of Moxee's Dispositive Motion to Dismiss Petition for Review, May 19, 2017;
- Respondent City of Moxee's Response to Petitioner's Dispositive Motion, May 19, 2017.

II. LEGAL STANDARDS FOR MOTIONS TO DISMISS

The legal standards for deciding motions to dismiss are derived from the Growth Management Act (GMA), Administrative Procedure Act, and analogous Superior Court Civil Rules. The Board is authorized by the GMA to dismiss a petition for review (PFR) if the

petition is frivolous or if the Board finds that the person filing the petition lacks standing.¹
The Board must also dismiss a petition when the Board determines it lacks subject matter jurisdiction, since the Board has no power to adjudicate that particular case.²

Under analogous Superior Court Civil Rule 12(b), a Motion to Dismiss should be granted when (A) the GMHB concludes it lacks subject matter jurisdiction or (B) viewing the facts in a light most favorable to the non-moving party, petitioners fail to state a claim upon which relief can be granted. Under the Board's Rules of Practice and Procedure, dispositive motions on a limited record to determine the board's jurisdiction, the standing of a petitioner, or the timeliness of the petition are permitted.

III. ANALYSIS AND DISCUSSION

The Growth Management Hearings Board is a creature of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication.³ As a quasi-judicial tribunal, the Board's powers are restricted to a review of those matters specifically delegated by statute.⁴ The power of an administrative tribunal to fashion a remedy is strictly limited by statute.⁵

The Board's jurisdictional authority to act is established by RCW 36.70A.280 and RCW 36.70A.290, which must be read together. RCW 36.70A.280(1) states in pertinent part: "The growth management hearings board shall hear and determine only those petitions alleging . . . [t]hat . . . a . . . city planning under this chapter is not in compliance with the requirements of this chapter." Under RCW 36.70A.290(2), the petition for review must relate to whether or not **an adopted comprehensive plan, development regulation,**

¹ RCW 36.70A.290(3).

² See *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks jurisdiction over a proceeding, it "may do nothing other than enter an order of dismissal"]. See also *Griffith v. City of Bellevue*, 130 Wn.2d 189, 196 (1996).

³ *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998). Administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted. *Id.* at 564.

⁴ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005).

⁵ *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998).

1 or permanent amendment thereto, is in compliance with the goals and requirements of
2 the GMA.

3 In *Wenatchee Sportsmen Association v. Chelan County et al.*, 141 Wn.2d 169, 178
4 (2000), the Supreme Court held: “unless a petition alleges that a comprehensive plan or a
5 development regulation or amendments to either are not in compliance with the
6 requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.”

7
8 In the present case, the PFR dated January 4, 2017, challenged the City of Moxee
9 City Council’s oral decision made at the public hearing on February 9, 2017, adopting the
10 “Hearing Examiner’s Decision on SEPA Appeal and Recommendations on Rezone and
11 Preliminary Plat Review,” dated January 3, 2017. The PFR presents two legal issues for
12 review by the Board:

- 13 1. Was the Moxee City Council’s oral decision made at the public hearing on
14 February 9, 2017 adopting the Hearing Examiner’s decision dated January 3,
15 2017 and entitled “Hearing Examiner’s Decision on SEPA Appeal and
16 Recommendations on Rezone and Preliminary Plat Review [City File Nos.
17 SUBDS2016-01, RZ2016-01 and ER2016-01]”, a *de facto* comprehensive plan
18 amendment under RCW 36.70A.070(3), RCW 36.70A.070(6)(F) and
19 *Alexanderson v. Bd. of Comm’rs*, 135 Wash. App. 541, 550, 144 P.3d 1219, 1223
20 (2006) that is subject to the Board’s jurisdiction?
- 21 2. Assuming the Board has jurisdiction to review the City Council’s February 9, 2017
22 oral decision as a *de facto* plan amendment, was the *de facto* plan amendment
23 made without following the GMA mandated requirements for public participation
24 set forth in the City’s Comprehensive Plan or RCW 36.70A.070(11), 36.70A.035,
25 36.70A.140 or RCW 36.70A.390?

26 The threshold question is whether Petitioners have challenged a comprehensive plan
27 or a development regulation or amendments to either and alleged non-compliance with the
28 requirements of the GMA.

29 To invoke the Board’s jurisdiction to review compliance with the GMA, a party with
30 standing must comply with that chapter’s procedural requirements:
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- 1 a) file a petition for review that includes a detailed statement of issues presented for
2 resolution by the Board;⁶
- 3 b) file the petition for review within 60 days after the date the city publishes the
4 ordinance, or summary of the ordinance, adopting the comprehensive plan or
5 development regulations, or amendment thereto;⁷ and
- 6 c) allege that the government agency is not in compliance with the requirements of
7 the GMA.⁸

8 In the present case, there is no evidence in the record that the City of Moxee enacted
9 an ordinance adopting the comprehensive plan or development regulations, or amendment
10 thereto. Instead the record shows that on February 9, 2017, the City Council took a voice
11 vote to adopt the "Hearing Examiner's Decision on SEPA Appeal and Recommendations on
12 Rezone and Preliminary Plat Review," dated January 3, 2017. The Hearing Examiner made
13 recommendations to: (1) approve an application to rezone a parcel of land from R-1 to R-2
14 and (2) approve a preliminary plat for 91 units. However, the Hearing Examiner did not
15 make any recommendations to amend the Comprehensive Plan.
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17 Thus, **the Board finds and concludes** that the City of Moxee did not explicitly
18 amend its comprehensive plan or development regulations. Petitioner failed to invoke the
19 Board's jurisdiction by appealing a City ordinance amending the Comprehensive Plan or
20 development regulations implementing the plan; however, Petitioner asserts that the
21 February 9, 2017, oral vote was a *de facto* comprehensive plan amendment.
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23 A city legislative action that does not explicitly amend the comprehensive plan is
24 considered to be a *de facto amendment* if it has the actual effect of amending the plan by
25 requiring the city to act in a manner inconsistent with the comprehensive plan. See
26 *Alexanderson v. Clark County Bd. Of Comms.*, 135 Wn. App. 541, 144 P.3rd 1219 (2006).
27 In *Alexanderson*, Clark County adopted a Memorandum of Understanding under which the
28 County agreed to provide water for a new, more intensive land use that was inconsistent
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31 ⁶ RCW 36.70A.290(1).

32 ⁷ RCW 36.70A.290(2). In addition to the GMA, the Board also has jurisdiction to hear and determine certain petitions alleging noncompliance with the Shoreline Management Act and the State Environmental Policy Act.

⁸ RCW 36.70A.280(1)(a).

1 with the land uses allowed by the comprehensive plan. The comprehensive plan stated
2 Clark County would not provide water to such inconsistent land uses. Under *Alexanderson*,
3 the Board does have jurisdiction over *de facto* amendments to a comprehensive plan.

4 Here, Petitioner argues that the City's oral decision adopting the Hearing Examiner's
5 recommendations on the rezone and preliminary plat was a *de facto* plan amendment
6 because Condition 5 requires the easterly extension of Chelan Avenue through the plat
7 without first amending the Comprehensive Plan under RCW 36.70A.070(3), RCW
8 36.70A.070(6)(F) and WAC 365-196-415(1)(c).⁹ The City responds that there is no
9 inconsistency with any plan element by requiring Petitioner to extend Chelan Avenue to
10 facilitate an orderly road network where the Comprehensive Plan does not speak to Chelan
11 Avenue one way or another.¹⁰ Petitioner did not present any evidence that the February 9,
12 2017, oral vote requires the City to take an action that would be inconsistent with the
13 Comprehensive Plan.
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15 Since the Comprehensive Plan sets forth general City-wide policies and is silent as to
16 the extension of Chelan Avenue, the City's requirement for Petitioner to extend Chelan
17 Avenue across the plat does not have the actual effect of amending the Comprehensive
18 Plan. The February 9, 2017, oral vote does not require the City to take an action that would
19 be inconsistent with the Comprehensive Plan.
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21 **The Board finds and concludes** that the City of Moxee City Council's February 9,
22 2017, oral decision was not a *de facto* amendment to the City of Moxee Comprehensive
23 Plan. **The Board further finds and concludes** that it lacks subject matter jurisdiction to
24 review the City of Moxee City Council's February 9, 2017, oral decision. Due to lack of
25 jurisdiction, the Board cannot consider Petitioner's Dispositive Motion.
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32 ⁹ Petitioner's Response to City of Moxee's Dispositive Motion to Dismiss Petition for Review (May 19, 2017) at 7.

¹⁰ City of Moxee's Response to Petitioner's Dispositive Motion (May 19, 2017) at 5.

1 **II. ORDER**

2 Respondent City of Moxee's Dispositive Motion to Dismiss Petition for Review is
3 **Granted.** The Petition for Review and Amended Petition for Review are dismissed and this
4 case is closed.
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6 DATED this 25th day of May, 2017.
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8 _____
9 Raymond L. Paolella, Board Member

10 _____
11 William Roehl, Board Member
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13 _____
14 Nina Carter, Board Member
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16 **Note: This is a final decision and order of the Growth Management Hearings Board**
17 **issued pursuant to RCW 36.70A.300.¹¹**
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30 ¹¹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
31 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved
32 by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in
RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the
board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It
is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management
Hearings Board is not authorized to provide legal advice.